

A Limitation on Congress: “In Suits at common law”

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The Supreme Court has interpreted many parts of the Constitution to limit the power of Congress including, for example, Articles I, II, and III and the First Amendment. This Symposium Article argues that another part of the Constitution, the Seventh Amendment, has not been viewed similarly by the Court, and that this view is incorrect. The Article assumes that the Court has properly adopted the English common law in 1791 as the law governing the Seventh Amendment. Using this law, in decisions on whether a jury trial right exists for a cause of action created by Congress, the Court has analyzed both whether the cause of action is sufficiently analogous to an English common law cause of action and whether the relief sought is of the type decided by juries in English common law courts. This two-prong examination has occurred despite the fact that whether a jury heard a claim in England in 1791 was based, with very few exceptions, only on the second prong—the relief sought, with damages being heard by juries. Also, the Court has been deferential to congressional decisions to place certain damages decisions in non-Article III forums, without a jury trial right, including in administrative agencies and bankruptcy courts. This Article argues that, at least in part because of this deferential way in which the Court has viewed Congress, the Seventh Amendment civil jury trial right has been improperly curtailed. The inquiry as to whether a jury trial right exists under the Seventh Amendment should be based only on the relief sought, and a jury trial right exists for congressionally-created causes of action with damages remedies, including ones that Congress has relegated to administrative agencies and bankruptcy courts.

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I. INTRODUCTION

A discussion of the limitations on the power of Congress invariably begins with Article I¹ and ends with other constitutional provisions like Article II,² Article III,³ and the First Amendment⁴ without a discussion of the Seventh Amendment.⁵ At the same time, through lawmaking, Congress has given significant claims to non-jury adjudicatory bodies.⁶ While the Supreme

¹ U.S. CONST. art. I.

² U.S. CONST. art. II.

³ U.S. CONST. art. III.

⁴ U.S. CONST. amend. I; *see, e.g.*, *United States v. Stevens*, 130 S. Ct. 1577 (2010) (holding federal statute regarding animal cruelty invalid under First Amendment).

⁵ U.S. CONST. amend. VII. Professor Martin Redish and Professor Daniel La Fave have argued forcefully that the Supreme Court has treated the Seventh Amendment differently than other constitutional provisions when the Court interprets the power of Congress. They argue that this treatment is incorrect as a matter of Seventh Amendment interpretation and as a matter of judicial review. They also argue that Congress, as a part of the constitutional democracy, should not have final judgment over its own actions. Martin H. Redish & Daniel J. La Fave, *Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL RTS. J. 407, 408-09 (1995).

⁶ *See, e.g.*, *Katchen v. Landy*, 382 U.S. 323 (1966); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); Ellen E. Sward, *Legislative Courts, Article III and the Seventh Amendment*, 77 N.C. L. REV. 1037 (1999) (discussing additional congressionally-created jurisdictions with no jury trial right).

Court has decided that a jury trial right can exist under the Seventh Amendment where Congress has created a new statutory cause of action, the Court has generally approved congressional authority to direct decision-making away from juries.⁷ In this set of decisions that permits non-jury adjudication by non-Article III forums, including administrative agencies and bankruptcy courts, it may be that there is dissatisfaction with the original decision that a jury trial right can exist for a statutory cause of action. This Symposium Article explores this question of the proper scope of the jury trial right for statutory causes of action. This Article adds to work by Professors Martin Redish, Daniel La Fave, and Ellen Sward who have shown the Court's deference to Congress on Seventh Amendment issues.⁸

The first clause of the Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."⁹ The Court has decided that the substance of the English common law in 1791, the date when the Seventh Amendment was adopted, governs the constitutional analysis.¹⁰ Thus, a jury

Through the Rules Enabling Act, Congress also has given courts significant power over juries, including through summary judgment and judgment as a matter of law. *See* Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007) (describing constitutional impropriety of summary judgment and also suggesting constitutional impropriety of judgment as a matter of law).

⁷ *See* Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486 (1975) (irrationality underlies Supreme Court Seventh Amendment jurisprudence).

⁸ *See* Redish & La Fave, *supra* note 5; *see also* Sward, *supra* note 6. Professors Redish and La Fave have described the Court's treatment of the Seventh Amendment when interpreting congressional enactments that affect the jury trial right as "pedagogically exiled from traditional constitutional law and instead relegated to the largely sub-constitutional inquiry of civil procedure." Redish & La Fave, *supra* note 5, at 408.

⁹ U.S. CONST. amend. VII. The rest of the Amendment can be found *infra* text accompanying note 15.

¹⁰ *See, e.g.,* Colgrove v. Battin, 413 U.S. 149, 155–56 (1973); *see also* Parsons v. Bedford, 28 U.S. 433 (1830); United States v. Wonson, 28 F. Cas. 745 (D. Mass. 1812) (No. 16,750). Of course, not everyone has agreed with the Supreme Court's decision to equate common law in the Seventh Amendment with the English common law. Akhil Amar, for example, has argued, although recognizing his argument is "not free from doubt," that the state law in which the federal court sits governs the scope of the Seventh Amendment civil jury trial. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 89–93 (1998). As another example, Stanton Krauss has argued that Congress should decide when there should be a jury trial according to the first clause, and then, the English common law should govern when courts can re-examine facts according to the second clause of the Amendment. *See* Stanton D. Krauss, *The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. RICH. L. REV. 407

trial right should exist as a general matter where a jury trial existed in England in 1791. As discussed here, in England in 1791, the courts of law and courts of equity generally provided different forms of relief. Law courts, which had juries, determined claims with damages, including statutory claims. Equity courts, on the other hand, decided claims, which sought specific performance or injunctions, and decided damages only under rare controversial circumstances.¹¹ This Article argues that in accordance with this history, the Seventh Amendment requires that juries hear claims with damages as they did in the courts of law in England in the eighteenth century, including hearing new statutory causes of action. Contrary to Supreme Court jurisprudence, which did not thoroughly analyze the English common law and statutory law, this Article argues that the only inquiry on whether a jury trial exists should be the relief sought, with claims with damages proceeding to juries. This Article also argues that despite parliamentary power to change the jurisdiction of the courts in England in the late eighteenth century, and thus the jurisdiction of the jury, because of differences between the English and American Constitutions, Congress has never had power to change the Seventh Amendment right.

Part II sets forth the interpretation of the Supreme Court of the first clause of the Seventh Amendment. Part III then describes the jurisdiction of the courts of law and the courts of equity in England in the late eighteenth century. Next, the Article explores the relationship between Parliament and the courts in the late eighteenth century, and specifically examines the authority of Parliament to alter the jurisdiction of the courts including for new statutory rights. Part IV argues that, to comport with the Seventh Amendment, claims with damages—whether under common law causes of action or under statutory causes of action, including matters currently heard by administrative agencies and bankruptcy courts—should be heard in courts before juries as they were, almost without exception, under the common law. Accordingly, Congress's power is also limited by the Seventh Amendment.

II. SUPREME COURT INTERPRETATION OF "IN SUITS AT COMMON LAW"

Of course, the Constitution did not at first provide for a jury trial right in civil cases. Significant concern mounted after the Framers gave the Supreme Court appellate jurisdiction over law and fact and did not include a jury trial

(1999); cf. Rachel E. Schwartz, "Everything Depends on How You Draw the Lines": *An Alternative Interpretation of the Seventh Amendment*, 6 SETON HALL CONST. L.J. 599 (1996) (rejecting English common law test and proposing that Congress controls the Seventh Amendment jury trial right).

¹¹ See *infra* Part III.

right.¹² Partly in response to the lack of a constitutional jury trial right, Congress passed the United States Judiciary Act of 1789, which among other things, granted power to juries to try “issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction.”¹³ At the same time that the Judiciary Act was passed, Congress proposed the Seventh Amendment, and it was subsequently adopted in 1791.¹⁴

A. *The Original Seventh Amendment English Common Law Rule*

The Seventh Amendment provides that

[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.¹⁵

Soon after the Amendment was adopted, the Supreme Court decided that the English common law governed Seventh Amendment constitutional questions. The first articulation of the English common law test came in 1812. Justice Story, sitting as a circuit judge, stated that

[b]eyond all question, the common law here alluded to is not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence. It cannot be necessary for me to expound the grounds of this opinion, because they must be obvious to every person acquainted with the history of the law.¹⁶

¹² See Ellen E. Sward, *A History of the Jury Trial in the United States*, 51 U. KAN. L. REV. 347, 372 (2003); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 667–73, 678–79, 693–94 (1973).

¹³ Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73 (Sept. 24, 1789) (An Act to Establish the Judicial Courts of the United States); see also *Parsons*, 28 U.S. at 447.

¹⁴ *Parsons*, 28 U.S. at 447.

¹⁵ U.S. CONST. amend. VII.

¹⁶ *United States v. Wonson*, 28 F. Cas. 745, 750 (D. Mass. 1812) (No. 16,750). In *Wonson*, just twenty-one years after the Seventh Amendment was adopted, Justice Story considered whether a congressional act, which referenced “appeal,” could give power to circuit courts to re-try facts before another jury on appeal from the district court. *Wonson*, 28 F. Cas. 745. He discussed the difference in the “legislative . . . privilege” of citizens of Massachusetts in their state courts to appeal and re-try facts in an appellate court versus “a constitutional privilege” to do this in the federal courts which did not exist. See *id.* at 748. A trial court could order a new trial of the facts under the rules of the common law,

Justice Story again examined the meaning of the Seventh Amendment jury trial right in 1830, this time in a decision for the Supreme Court in *Parsons v. Bedford*.¹⁷ In *Parsons*, the plaintiffs alleged that they sold tobacco to an agent of the defendant, and the defendant did not pay.¹⁸ The plaintiffs prevailed in a jury trial, and the district court refused to order a new trial.¹⁹ On the appeal, the defendant argued that the lower court incorrectly did not order the testimony of witnesses recorded for purposes of appeal in accordance with the state law, which the federal law—the Act of 1824—had made applicable.²⁰ The recorded evidence would have been used to support the reversal of the district court and the order of a new trial by the appellate court.²¹ Justice Story stated that the district court should have adopted the state procedure in the absence of a special rule by the district court.²² Accepting that this was error for the court not to do, Justice Story considered whether the Court could review the district court's decision and discussed the requirements of the Seventh Amendment.²³

In his discussion of the meaning of common law in the Seventh Amendment, Justice Story stated that when the Amendment was adopted, the states had adopted the common law, and the common law was so ingrained that it must have been anticipated that other states also would adopt the common law.²⁴ Justice Story went on to describe that the "common law" jury trial right under the Seventh Amendment was for legal rights, as opposed to equitable and admiralty claims, and included new legal rights.

The phrase "common law," found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. . . . It is well known,

and a court above on writ of error could order a new trial if there was a legal error. *Id.* at 750. Justice Story stated that "[a]ccording to the obvious intention of the amendment, the legislature then could have no authority to give an appellate jurisdiction, the power to re-examine by a jury the former decision of another jury, while the judgment below stood unreversed." *Id.* The Court did not find, however, that, through the statute, Congress had acted unconstitutionally "transcend[ing] its constitutional authority." *Id.* There was no support in Massachusetts nor in the common or civil law, for such an interpretation of the word "appeal," and Congress should not be presumed to have acted unconstitutionally. *Id.*

¹⁷ 28 U.S. 433 (1830).

¹⁸ *See id.* at 441.

¹⁹ *See id.*

²⁰ *See id.* at 442.

²¹ *See id.* at 443.

²² *See id.* at 444–45.

²³ *See Parsons*, 28 U.S. at 445.

²⁴ *See id.* at 446.

that in civil causes, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court. . . . By *common law*, they meant what the constitution denominated in the third article “law;” not merely suits, which the *common law* recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity was often found in the same suit. Probably there were few, if any, states in the union, in which some new legal remedies differing from the old common law forms were not in use; but in which, however, the trial by jury intervened, and the general regulations in other respects were according to the course of the common law. Proceedings in cases of partition, and of foreign and domestic attachment, might be cited as examples variously adopted and modified. In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.²⁵

Justice Story also discussed the Judiciary Act of 1789.

[F]or in the ninth section it is provided, that “the trial of issues in fact in the *district courts* in all causes, except civil causes of *admiralty and maritime jurisdiction*, shall be by jury;” and in the twelfth section it is provided, that “the trial of issues in fact in the *circuit courts* shall in all suits, except these of *equity*, and of *admiralty* and maritime jurisdiction, be by jury;” and again, in the thirteenth section, it is provided, that “the trial of issues in fact in the *supreme court* in *all actions at law* against citizens of the United States, shall be by jury.”²⁶

Justice Story stated that the Judiciary Act’s language, which distinguished equity and admiralty claims, supported that the Seventh Amendment’s language “[i]n Suits at common law,” which was proposed by Congress in the same time period, also referred to suits that were not of equity or admiralty jurisdiction.²⁷

In addition to the first clause of the Amendment, Justice Story discussed the second clause of the Amendment, which he called “a substantial and

²⁵ *Id.* at 446–47.

²⁶ *Id.* at 447.

²⁷ *Id.*

independent clause.”²⁸ The main question in *Parsons* had been whether the Court had appellate jurisdiction to order a new trial. Under the English common law, only the court that tried the case could order a new trial.²⁹ Justice Story stated that in the Act of 1824, Congress had not created appellate jurisdiction to order a new trial, and he also emphasized that if Congress had attempted to give this new power to the appellate courts, which would affect the jury trial, the Act most likely would violate the Seventh Amendment. He stated that “[i]f, indeed, the construction contended for at the bar were to be given to the act of congress, we entertain the most serious doubts whether it would not be unconstitutional.”³⁰

In his dissent, Justice McLean stated that this matter was not a suit at common law just because a jury tried it.³¹ Indeed, the procedure under the state law was very different than a common law suit.³² Also Justice McLean answered the objection that if Congress could avoid the Seventh Amendment through its adoption of state procedure, it could completely abolish the jury trial by creating new procedures that did not exist under the common law. He asserted that Congress had the power to eliminate the lower courts, which would in effect eliminate all juries. However, Justice McLean saw no cause for concern as Congress was as unlikely to do this as it was to abolish the jury trial through the creation of new procedures.³³

B. Statutory Causes of Action

While the Supreme Court in *Parsons* in 1830 had suggested that a Seventh Amendment jury trial right could exist for a new legal right created by Congress, many years later, in the 1970s, in *Curtis v. Loether*,³⁴ the Supreme Court explicitly considered whether a jury trial right existed for a

²⁸ See *id.* at 447; *cf.*, e.g., Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 IOWA L. REV. 499 (1998) (discussing second clause).

²⁹ See *Parsons*, 28 U.S. at 448. *But see* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 432–36 (1996) (permitting appellate review of denial of new trial motion).

³⁰ See *Parsons*, 28 U.S. at 448.

³¹ See *id.* at 454–55 (McLean, J., dissenting).

³² See *id.* at 455.

³³ See *id.* In later cases the Supreme Court made clear that 1791, the year when the Seventh Amendment was adopted, governed the English common law analysis for the Seventh Amendment. See *Pernell v. Southall Realty*, 416 U.S. 363, 374–75 (1974); *Curtis v. Loether*, 415 U.S. 189, 193 (1974); *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935) (“The right of trial by jury . . . is the right which existed under the English common law when the amendment was adopted.”).

³⁴ 415 U.S. 189 (1974).

congressionally-created cause of action with a damages remedy.³⁵ The plaintiff, who was black, had alleged that the defendants, who were white, did not rent an apartment to her because of her race in violation of Title VIII of the Civil Rights Act of 1968.³⁶ The plaintiff sought injunctive relief, punitive damages, and compensatory damages, and the defendants requested a jury trial.³⁷ After the trial court decided that neither Title VIII nor the Seventh Amendment required a jury trial,³⁸ the court found for the plaintiff and awarded damages.³⁹ On its review, the court of appeals reversed, deciding that the defendants had a right to a jury trial under the Seventh Amendment.⁴⁰

The Supreme Court unanimously affirmed that the defendants had a jury trial right under the Seventh Amendment and rejected the plaintiff's argument that no jury trial right existed when Congress created a new cause of action.⁴¹ After the Court briefly discussed the possible intention of Congress as reflected in the legislative history of Title VIII, the Court stated that Congress's intent was irrelevant, because a jury trial right existed under the Seventh Amendment.⁴² The Court quoted *Parsons v. Bedford* in support of the proposition that "it has long been settled that the [Seventh Amendment] right extends beyond the common-law forms of action."⁴³ The Court also stated that it had previously, although without significant analysis, found a jury trial right in other cases based on congressionally-created causes of action.⁴⁴ Here, the Court explicitly decided that a jury trial right existed when Congress created a legal right and remedy for the law courts. It stated that "[t]he Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights

³⁵ See *id.* at 189–90; see also Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1859–60 (2008).

³⁶ *Curtis*, 415 U.S. at 190.

³⁷ See *id.*

³⁸ See *id.* at 190–91.

³⁹ See *id.* at 191. The defendants had been enjoined from renting the apartment but with plaintiff's consent this injunction was dissolved when the plaintiff found another place to rent. *Id.* at 190.

⁴⁰ See *id.* at 191.

⁴¹ See *id.* at 192–93.

⁴² See *Curtis*, 415 U.S. at 191–93.

⁴³ See *id.* at 193 ("[T]he amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights." (quoting *Parsons v. Bedford*, 3 Pet. 433, 446–47 (1830))).

⁴⁴ See *id.* at 193–94.

and remedies, enforceable in an action for damages in the ordinary courts of law.”⁴⁵

The Court distinguished *NLRB v. Jones & Laughlin Steel Corp.*,⁴⁶ where no jury trial right existed, because “the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the NLRB’s role in the statutory scheme.”⁴⁷ The Court also distinguished *Katchen v. Landy*⁴⁸ where no jury trial right existed, because bankruptcy courts were courts of equity, and jury trials were inconsistent with the Bankruptcy Act.⁴⁹ The Court stated that “[t]hese cases uphold congressional power to entrust enforcement of statutory rights to an administrative process or specialized court of equity free from the strictures of the Seventh Amendment.”⁵⁰ The cause of action in this case was different, however, because Congress had not placed this claim in a special jurisdiction. Congress had given it to the district courts.

[W]hen Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law.⁵¹

The Court then explained that “it is clear that a damages action under § 812 is an action to enforce ‘legal rights’ within the meaning of our Seventh Amendment decisions.”⁵² The Court stated that the cause of action was analogous to common law actions tried to juries, and “[m]ore important, the relief sought here—actual damages and punitive damages—[was] the traditional form of relief” given in those actions.⁵³ In a footnote, the Court, citing *Beacon Theatres, Inc. v. Westover*⁵⁴ and *Dairy Queen v. Wood*,⁵⁵

⁴⁵ See *id.* at 194.

⁴⁶ 301 U.S. 1 (1937).

⁴⁷ See *Curtis*, 415 U.S. at 194.

⁴⁸ See 382 U.S. 323 (1966).

⁴⁹ See *Curtis*, 415 U.S. at 195.

⁵⁰ See *id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 195–96; see also Redish, *supra* note 7, at 490–91 (“If the action sought money damages, the case was legal and a jury could be obtained.”).

⁵⁴ 359 U.S. 500 (1959).

⁵⁵ 369 U.S. 469 (1962).

stated that the jury trial right could not be avoided by the characterization of the damages or legal right as incidental to the injunctive or equitable right.⁵⁶

The Court distinguished the damages available in this case under Title VIII from the backpay relief available under Title VII.⁵⁷ Based on the statutory language in Title VII, which described backpay as equitable, the courts of appeals had stated backpay under Title VII was equitable.⁵⁸ The language in Title VII contrasted with the damages language in Title VIII, which the Court stated was not described as equitable.⁵⁹ In addition, under Title VII, there was discretion for courts on whether to order backpay comparable to the discretion permitted in equity courts, but Title VIII permitted no such discretion on whether to order damages.⁶⁰ Finally, the damages under Title VIII could not otherwise be viewed as equitable.⁶¹

Since *Parsons*, *Curtis*, and the cases cited therein, the Court has continued to define when a jury trial exists when Congress creates a new cause of action with damages. In summary, under the Supreme Court jurisprudence where Congress creates a new cause of action with damages, a jury trial right may exist. A jury trial right may exist in some circumstances where the damages relief sought is incidental to equitable relief.⁶² However, Congress may be able to label relief as equitable or discretionary and thus, give judges jurisdiction over these claims.⁶³ Also, Congress can designate public rights with damages for a determination by administrative agencies

⁵⁶ See *Curtis*, 415 U.S. at 196 n.11.

⁵⁷ See *id.* at 196–97.

⁵⁸ See *id.*

⁵⁹ See *id.*

⁶⁰ See *id.* at 197.

⁶¹ See *id.* The example given by the Court of such “equitable” damages was the plaintiff receiving what the defendant had not properly given her. See *id.* Also the Court stated that a court could direct a verdict, order judgment notwithstanding the verdict, or order a new trial. See *id.* at 198. In *Curtis*, the Court also emphasized that a jury trial right existed under the Constitution regardless of whether the plaintiff did not want one or feared jury prejudice. See *id.* In the last footnote, in response to the plaintiff’s argument that the discrimination policies that underlie Title VIII derived from the Thirteenth and Fourteenth Amendments, the Court stated that the plaintiff had not also argued that these policies could properly eliminate the jury trial right under the Constitution. See *id.* at 198 n.15. Moreover, the legislative history of Title VIII did not suggest that “Congress intended to override the requirements of the Seventh Amendment.” *Id.* As a result, the Court did not consider “the scope of congressional power to enforce” the Thirteenth and Fourteenth Amendments. *Id.*

⁶² See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937); see also *Dairy Queen v. Wood*, 369 U.S. 469 (1962); *Beacon Theatres v. Westover*, 359 U.S. 500 (1959).

⁶³ *Curtis*, 415 U.S. at 197.

and create equity courts that can determine money damages.⁶⁴ Moreover, the definition of what qualifies as a public right is unclear and seems to include some actions of a private nature.⁶⁵ Whether the jury is incompatible with the right being adjudicated or, in other words, whether there is a functional justification for taking the matter away from the jury has also been discussed by the Court when defining the jury trial right.⁶⁶ Finally, the possibility that courts can determine damages themselves has been left open.⁶⁷

Some scholars have extensively analyzed the deference of the Supreme Court to Congress and have discussed the role of Congress as indicated by the history of the Seventh Amendment. Professors Redish and La Fave have distinguished the Court's Seventh Amendment jurisprudence as involving two strands, one based on whether Congress is neutral about the jury trial

⁶⁴ *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51–52 (1989); *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 455 (1977).

⁶⁵ Relying on *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1855), in his concurrence in *Granfinanciera*, Justice Scalia stated that the federal government must be sued or be suing in order for a public right to be invoked and to put the matter outside of an Article III court. *See* 492 U.S. at 66–69 (otherwise, waiver of sovereign immunity required); Sward, *supra* note 6, at 1081–83.

⁶⁶ *See Tull v. United States*, 481 U.S. 412, 418 n.4 (1987) (“[T]he Court has not used these considerations as an independent basis for extending the right to a jury trial under the Seventh Amendment.”); *see also Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 388 (1996) (Souter stating functional capacities should help govern Seventh Amendment analysis); *Chauffeurs Local No. 391 v. Terry*, 494 U.S. 558, 565 n.4, 583 (1990) (Stevens, in concurrence, arguing for functional typical jury judgment approach and Marshall stating this is not the standard); *Atlas*, 430 U.S. at 455; *Curtis*, 415 U.S. at 195; JAMES OLDHAM, *TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES* 17 (2006) (discussing complexity exception and *Ross v. Bernhard's* Seventh Amendment standard that included the “practical abilities and limitations of juries”).

⁶⁷ *Tull*, 481 U.S. 412; *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998) (calling into question the decision in *Tull* that a jury need not determine damages pursuant to the Seventh Amendment); *cf. OLDHAM, supra* note 66, at 49–56 (discussing writ of inquiry, the determination of damages by juries, and disposing of misimpression that judges could determine damages without consent of parties upon plaintiff obtaining a judgment (usually upon a default judgment or prevailing upon a demurrer)). Professor Oldham has extensively discussed these and other cases and has concluded that historically damages were for the determination of the jury through the use of writs of inquiry. *Id.* at 45–79 (also discussing *Cooper Inds., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), and several common law cases). *But see* David L. Shapiro & Daniel R. Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill*, 85 HARV. L. REV. 442, 442 (1971) (stating, prior to the decisions in many of these cases, that “[a]ny close question—and sometimes one that is not so close—is resolved in favor of the jury trial right without serious analysis of history, precedent, or policy”).

right and the other based on whether Congress gave a matter to a non-Article III, non-jury forum.⁶⁸ In those cases where Congress gave the matter to a non-Article III, non-jury forum, there is “judicial deference to . . . congressional judgment[s] concerning the incompatibility of the use of civil jury trial with a statutory scheme.”⁶⁹ Professor Sward has also discussed the Seventh Amendment’s history as “suggest[ing] that the Seventh Amendment was born of an unwillingness to trust Congress to do the right thing with respect to the right to a civil jury trial and is therefore an independent check on Congress’s powers to determine the mode of adjudication.”⁷⁰

III. THE ENGLISH JURY TRIAL IN THE EIGHTEENTH CENTURY

The question is whether the Supreme Court has drawn the correct lines for the jury trial right by giving Congress significant deference where Congress has created the cause of action. Professors Redish and La Fave have stated that the Court has not applied the English common law in 1791 to its Seventh Amendment jurisprudence when it considers congressional enactments.⁷¹ They argue that this jurisprudence can be justified only on the basis of functionalism over constitutional theory, and that this reasoning cannot be sustained.⁷² On the other hand, they argue that if the Court overruled *Parsons* and decided that any cause of action enacted after the adoption of the Seventh Amendment does not require a jury trial, the jurisprudence of the Court, including having no jury trials in non-Article III adjudications, would be based on coherent constitutional theory.⁷³ They do not take a position, however, on whether *Parsons* was correct to permit a jury trial for causes of action created by Congress.⁷⁴ This Part directly addresses this question. It examines the English common law and statutory law in the late eighteenth century, which the Court itself has not thoroughly analyzed, to explore the correct lines for the jury trial right for congressionally-created causes of action.

⁶⁸ Redish & La Fave, *supra* note 5, at 412–30.

⁶⁹ *See id.* at 426–27.

⁷⁰ Sward, *supra* note 6, at 1102.

⁷¹ *See* Redish & La Fave, *supra* note 5, at 417–29. Professors Redish and La Fave examined several alternative explanations for the Supreme Court’s deference to Congress on the basis of public rights. *See id.* at 430–50. They also explore a less strict historical test. *See id.* at 450–52. ⁷² *See id.* at 442–50.

⁷² *See id.* at 442–50.

⁷³ *See id.* at 452–53.

⁷⁴ *See id.* at 453.

This Part first assumes that the Supreme Court correctly decided that “common law” in the Seventh Amendment is the English common law in 1791. While there is disagreement on the propriety of the Court’s decision, there is no consensus on an alternative.⁷⁵ Indeed, the Supreme Court has applied the English common law when it interprets other parts of the Constitution that do not expressly adopt the common law,⁷⁶ and, in the absence of contrary significant proof that the common law is not the English common law, it seems appropriate to apply this law also to the Seventh Amendment where the common law is explicitly adopted.

Examining the English courts in 1791, a jury trial existed in the courts of law,⁷⁷ which were also referred to as English common law courts.⁷⁸ Thus, “[i]n Suits at common law, . . . the right of trial by jury shall be preserved” in the Seventh Amendment must refer to actions in the English courts of law, and this jurisdiction of the English courts of law determines when a jury trial right exists.

A. The Interrelationship Between the Courts of Law and the Courts of Equity

In his eighteenth century *Commentaries on the Laws of England*, on which colonists and Framers relied, William Blackstone described the courts of “public and general jurisdiction” as of “four sorts . . . [including] the universally established courts of common law and equity.”⁷⁹ Commentators often referred to the jurisdiction of the courts of equity when referring to the jurisdiction of the courts of law and vice versa. In his eighteenth century *A Treatise of Equity*, in conjunction with his description of the jurisdiction of the courts of law to order damages, Henry Ballow described the need for

⁷⁵ See *supra* note 10.

⁷⁶ See, e.g., *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004); cf. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 164–65, 164 n.59 (1996) (Souter, J., dissenting) (while the Seventh Amendment and the Eleventh Amendment both have common law influence, the former, by its specific language, “intended to adopt the common law”).

⁷⁷ See, e.g., 3 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 60 (The Univ. of Chi. Press 1979) (1768).

⁷⁸ U.S. CONST. amend. VII; see, e.g., 1 HENRY BALLOW, *A TREATISE OF EQUITY* 15 (John Fonblanque ed., 1793).

⁷⁹ 3 BLACKSTONE, *supra* note 77, at 30. The other courts were ecclesiastical courts, military courts and maritime courts. See *id.* The importance of Blackstone is debated, and the complete accuracy of his description of the common law is also discussed. See, e.g., Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731 (1976).

courts of equity, which could order specific performance or an injunction. He stated that

[b]ut the law of England was very defective in this particular, and fell short of natural justice, . . . for executory agreements were there looked upon but as a personal security, and damages only to be recovered for the breach of them; most commonly either by an action of covenant, if there was a deed, or by an assumpsit, if without deed. But it proving a great hardship, in particular cases, to be left only to the uncertain reparation by damages, which the personal estate perhaps may not be able to satisfy, courts of equity, therefore, where there was a sufficient consideration, did, in aid of the municipal law, compel a specific performance. And there are many other cases wherein equity will give relief, although there be a remedy at law, if that be insufficient; as for a nuisance by injunction, or the like . . .⁸⁰

Similar to Ballow, Blackstone referred to the need for courts of equity in relationship to the jurisdiction of the courts of law. In a chapter on the courts of law and equity, Blackstone concluded by stating that

[i]f facts are disputed, they are sent down to be tried in the country by the neighbours; but the law, arising upon those facts, is determined by the judges above If the rigour of general rules does in any case bear hard upon individuals, courts of equity are open to supply the defects, but not sap the fundamentals, of the law.⁸¹

Additionally, John Fonblanque also described the interrelationship between the courts of law and equity. He stated that “[t]he jurisdiction exercised by courts of equity may be considered in some cases as assistant to, in some concurrent with, and in others exclusive of, the jurisdiction of courts of common law.”⁸²

⁸⁰ 1 BALLOW, *supra* note 78, at 27–28. Equity arose as a system of jurisprudence in the 14th century to address the increasing rigidities of the common law. *See* S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 83–86 (Butterworths, 2d ed. 1981).

⁸¹ 3 BLACKSTONE, *supra* note 77, at 60.

⁸² 1 BALLOW, *supra* note 78, at 10 (in Fonblanque’s additions). Fonblanque further described that

[i]t is assistant to the jurisdiction of courts of law; “Ist, By removing legal impediments to the fair decision of a question depending in courts of law. 2dly, By compelling a discovery which may enable them to decide. 3dly, By perpetuating testimony, when in danger of being lost, before the matter to which it relates can be made the subject of judicial investigation. It may also be said to be assistant, by rendering the judgments of courts of law effective, as by providing for the safety of property in dispute pending a litigation; by counteracting fraudulent judgments, &c.;

B. *The Jurisdiction of the Courts of Law and the Courts of Equity*

The jurisdictions of the courts of law and equity were based on whether the courts of law could provide adequate protection for the litigant.⁸³ Only when the courts of law could not do so did the courts of equity act. Indeed, the bill in the court of equity usually stated "and for that your orator is wholly without remedy at the common law."⁸⁴ *Rogers v. Challis*,⁸⁵ a mid-nineteenth century case, demonstrates the limited jurisdiction of the courts of equity. Under the alleged facts in that case, the defendant agreed to borrow money from the plaintiff.⁸⁶ The defendant subsequently decided not to borrow the money from the plaintiff, because he could borrow the money on better terms from someone else.⁸⁷ The plaintiff brought a bill seeking specific performance for defendant to borrow the money.⁸⁸ The Master of Rolls stated that "[t]he Court has said that the reason for compelling a specific performance of a contract is because the remedy at law is inadequate or defective."⁸⁹ Here the remedy at law was adequate where "a jury would

and by putting a bound to vexatious and oppressive litigation." It exercises a concurrent jurisdiction with courts of law, in most cases of fraud, accident, mistake, account, partition, and dower. It claims an exclusive jurisdiction in all matters of trust and confidence; and "wherever, upon the principles of universal justice, the interference of a court of judicature is necessary to prevent a wrong, and the positive law is silent."

1 BALLOW, *supra* note 78, at 10-11 (in Fonblanque's additions).

Their solution of the problem of the relation of law to equity was not a fusion, but a partnership, based upon a division of the jurisdiction of the court of Chancery under the well-known three heads of auxiliary, concurrent, and exclusive. That classification, implicit in the equitable jurisdiction all through the eighteenth century, was made explicitly by Fonblanque in his *TREATISE OF EQUITY*, the first edition of which was published in 1793-1794. The principles of equity coming under these three heads were so developed that a conflict between the rules of law and equity was avoided.

12 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 601-02 (1938); 6 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 624, 668-71 (1924).

⁸³ See, e.g., 12 HOLDSWORTH, *supra* note 82, at 584 ("equity scrupulously following the law").

⁸⁴ See 3 BLACKSTONE, *supra* note 77, at 442.

⁸⁵ (1859) 54 Eng. Rep. 68 (Ch.); 27 Beav. 175.

⁸⁶ See *id.* at 68, 27 Beav. at 175.

⁸⁷ See *id.*

⁸⁸ See *id.*

⁸⁹ *Id.* at 70, 27 Beav. at 179. He first considered the case independently of Sir Hugh Cairns' Act, which will be discussed *infra* notes 154-62, 180-97 and accompanying text. *Id.* at 69-70, 27 Beav. at 177-80.

easily assess the amount of the damage which the Plaintiff has sustained.”⁹⁰ The Master stated that the jurisdiction of the court to order specific performance did not include a case involving an agreement to loan money.⁹¹ *Rogers* cited *Cud v. Rutter*,⁹² a case from the early eighteenth century, as support for its decision here.⁹³ In *Cud*, under the alleged facts, the defendant had agreed to sell stock to the plaintiff.⁹⁴ There, Lord Parker had decided that the plaintiff could buy the stock with the damages that the courts of law could award. He stated “that a court of equity ought not to execute any of these contracts, but to leave them to . . . law, where the party is to recover damages, and with the money may if he pleases buy the quantity of stock agreed to be transferred to him.”⁹⁵

While the priority was for a remedy in a court of law, the courts operated in conjunction with one another. As described below, parties could receive damages from juries in courts of law but could receive discovery, examine other parties, and receive specific performance and injunctions only from courts of equity.⁹⁶ In addition, a few matters were limited to the exclusive

⁹⁰ *Id.* at 70, 27 Beav. at 179.

⁹¹ *See Rogers*, 54 Eng. Rep. at 70, 27 Beav. at 179.

⁹² (1719) 24 Eng. Rep. 521 (Ch.); 1 P. WMS. 569.

⁹³ *See Rogers*, 54 Eng. Rep. at 70, 27 Beav. at 179. The Court also cited other cases. *See id.*

⁹⁴ *See Cud*, 24 Eng. Rep. at 521, 1 P. WMS. at 570.

⁹⁵ *See id.* at 522, 1 P. WMS. at 571. In *Rogers*, the Master of Rolls stated that the facts there were even weaker to order specific performance than in *Cud v. Rutter* where the breach of the agreement not to sell stock could create more injury and the damages were not as certain. *See Rogers*, 54 Eng. Rep. at 70, 27 Beav. at 179.

⁹⁶ Plucknett described the relationship of the courts as follows: “Chancery would send issues to be tried by a jury in a common law court, and would get the opinion of the judges on points of common law; litigants in the common law courts on the other hand would have recourse to Chancery in order to obtain discovery and other like advantages.” THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 211 (5th ed. 1956); 3 BLACKSTONE, *supra* note 77, at 437–38 (parties cannot be examined in courts of law, and discovery is available in courts of equity); 2 HENRY BALLOW, A TREATISE OF EQUITY 480–95 (John Fonblanque ed., 1795) (discovery in courts of equity); *see also* Sward, *supra* note 12, at 356 (equity courts, in contrast to common law courts, had no jury, written evidence, and multiple claims and parties).

A plaintiff was also required to plead using a form of action in a court of law, while in equity this was not required. Civil actions were divided into three categories: (1) real actions, (2) personal actions, and (3) mixed actions. *See* 1 WILLIAM TIDD, THE PRACTICE OF THE COURT OF KING’S BENCH, IN PERSONAL ACTIONS: WITH REFERENCES TO CASES OF PRACTICE IN THE COURT OF COMMON PLEAS 1–7 (Isaac Riley ed., Alsop, Brannan & Alsop, 2d Am. ed. 1807). Personal actions were organized into contracts and wrongs. *See id.* Under all these actions, a person could pray for damage awards for both direct and

jurisdiction of the courts of equity. Also, Parliament did not attempt to alter these divisions of jurisdiction between the courts of law and equity in the late eighteenth century.

1. *The Need for Discovery by Plaintiffs*

Courts of law and equity could hear most cases of fraud, accident and mistake, account, partition, and dower generally due to the need for discovery.⁹⁷ While some objected to this concurrent jurisdiction of the courts of law with the courts of equity, this jurisdiction was “justified by the propriety of preventing a multiplicity of suits.”⁹⁸ Resort to courts of equity was necessary because these types of cases required discovery, for example the testimony of the defendant who had the knowledge to prove the matter, which was not available in courts of law.⁹⁹ Fonblanque stated that, once the case was in equity, “for the purpose of discovery, [the court] [would] entertain it, for the purpose of relief, in most cases of fraud, account, accident, and mistake; and for other reasons [would] entertain suits for partition and dower.”¹⁰⁰ Among other cases, Fonblanque cited *Lee v. Alston*.¹⁰¹ In *Lee v. Alston*, despite defendant’s argument that a court of

consequential harms. *See id.* Some of the forms of action included debt, covenant, assumpsit, and trespass on the case. *See id.*

⁹⁷ 1 BALLOW, *supra* note 78, at 10–11 (in Fonblanque’s additions); *see also* 3 BLACKSTONE, *supra* note 77, at 431–32; PLUCKNETT, *supra* note 96, at 689 (the common law doctrines of “fraud, mistake, accident, and forgery [were] extremely meagre”).

Blackstone had stated:

[I]t hath been said, that *fraud*, *accident*, and *trust* are the proper and peculiar objects of a court of equity. But every kind of *fraud* is equally cognizable, and equally adverted to, in a court of law: and some frauds are only cognizable there, as fraud in obtaining a devise of lands, which is always sent out of the equity courts to be there determined. Many *accidents* are also supplied in a court of law; as, loss of deeds, mistakes in receipts or accounts, wrong payments

3 BLACKSTONE, *supra* note 77, at 431.

⁹⁸ 1 BALLOW, *supra* note 78, at 11 (in Fonblanque’s additions).

⁹⁹ *See id.* The defendant could not be examined in a court of law. Fonblanque stated that a party’s testimony was not necessary for the plaintiff to prove his case in cases of partition and dower. *See id.* at 12. At the same time though he has described the need for the courts of equity in such cases partially because of the need for discovery. *See id.* at 15–20.

¹⁰⁰ 1 BALLOW, *supra* note 78, at 12 (in Fonblanque’s additions); 2 BALLOW, *supra* note 96, at 493 (in Fonblanque’s additions) (“There are some causes in which, though the plaintiff might be relieved at law, a court of equity having obtained jurisdiction for the purpose of discovery, will entertain the suit for the purpose of relief.”).

¹⁰¹ (1783) 28 Eng. Rep. 1078 (Ch.); 1 Bro. C. C. 195.

equity could not have jurisdiction for an account alone which was properly only for law, the Lord Chancellor stated that “[u]ndoubtedly, if the case required nothing but a discovery, it should not come here, but, on the discovery had, they should proceed at law; but where an account is necessary it carries relief with it.”¹⁰² At the same time, Fonblanque stated that “[b]ut there certainly are other cases, when, though the plaintiff be entitled to a discovery, he is not entitled to relief.”¹⁰³ Among other cases, he cited *Doctor Sloane v. Heatfield*.¹⁰⁴ In *Sloane*, the court stated that the bill for discovery was proper but the bill for treasure trove within his manor was not.¹⁰⁵ The plaintiff could not have relief in the court of equity as he could bring an action for trover in the courts of law.¹⁰⁶ Fonblanque stated that he could not reconcile the principles in the cases regarding when, upon discovery, equity could retain jurisdiction to order relief, but he concluded that it was “now settled” where only discovery was proper, courts of equity could not render damages.¹⁰⁷

2. Plaintiff's Need for Relief in Courts of Equity

a. Denton v. Stewart

In some cases, a plaintiff would be in a court of equity for purposes of specific performance or an injunction and then, would request damages in the court.¹⁰⁸ Much of the discussion of whether the courts of equity had

¹⁰² See *id.* at 1079, 1 Bro. C. C. at 196.

¹⁰³ 2 BALLOW, *supra* note 96, at 493–94 (in Fonblanque's additions).

¹⁰⁴ *Id.* (citing *Doctor Sloane v. Heatfield*, (1717) 145 Eng. Rep. 579 (Court of Exchequer); Bunbury 18).

¹⁰⁵ *Sloane*, 145 Eng. Rep. at 579, Bunbury at 18.

¹⁰⁶ See *id.* at 579, Bunbury at 18; see also *Price v. James*, (1788) 29 Eng. Rep. 175 (Ch.); 2 Bro. C. C. 319 (while discovery was proper, the demurrer to the relief was granted).

¹⁰⁷ 1 HENRY BALLOW, A TREATISE OF EQUITY 663 (John Fonblanque ed., 2d ed. 1835); see also 2 BALLOW, *supra* note 96, at 494 (in Fonblanque's additions); 1 BALLOW, *supra* note 78, at 38 (in Fonblanque's additions) (“Chancery cannot assess damages.”). Here, Fonblanque adds a comment regarding *Denton v. Stewart*. See 1 BALLOW, *supra* note 78, at 38 (in Fonblanque's additions). This case is discussed below. But see 2 BALLOW, *supra* note 96, at 493–94 (in Fonblanque's additions) (“[I]t shall not be an hand-maid to other courts nor beget a suit to be ended elsewhere.”)

¹⁰⁸ In *Jesus College v. Bloom*, the plaintiff brought a bill for an account and satisfaction for waste for the defendant's cutting down of its trees and did not request an injunction. (1745) 26 Eng. Rep. 953 (Ch.); 3 Atk. 262. The Lord Chancellor decided, however, that “[w]aste is a tort, and the remedy lies at law. . . . The ground of coming into this court is, to stay the waste, and not by way of satisfaction for the damages, but by

jurisdiction to order such damages centers on *Denton v. Stewart*,¹⁰⁹ a case from the late eighteenth century. The plaintiff had possession of a house after the sale of the house to the plaintiff by the defendant, and defendant subsequently obtained possession after a judgment of ejectment.¹¹⁰ The plaintiff then brought a bill for specific performance of the agreement of the defendant to sell the house to the plaintiff.¹¹¹ Lord Kenyon, who was Master of Rolls at the time in his first judicial appointment and later was to become the Chief Justice of King's Bench, decided that because the plaintiff had done such things as furnishing and repairing the house that specific performance should be ordered. However, the defendant answered that he had sold the house.¹¹² Lord Kenyon then ordered the master in chancery to determine the damages that the plaintiff had suffered.¹¹³

b. *The Aftermath of Denton*

In *Greenaway v. Adams*,¹¹⁴ in the early nineteenth century, the Master of Rolls considered the effect of *Denton* on the jurisdiction of the courts of equity to order damages.¹¹⁵ There, the defendant had agreed to sell her interest in a house to the plaintiff.¹¹⁶ However, the defendant's lease with her landlord required the landlord's consent for assignment.¹¹⁷ The plaintiff refused to buy the interest without the landlord's consent and filed a bill for specific performance.¹¹⁸ The defendant subsequently sold the interest to

way of prevention of the wrong, which courts of law cannot do in those instances." *Id.*, 3 Atk. at 263. This case was distinguished from

bills for account of assets . . . , that originally was only a bill for discovery, which cannot be had without an account, and therefore the court will make a complete decree and give the party his debt likewise. . . . [and from] bills for *injunctiōes* [where] the court will make a complete decree, and give the party a satisfaction, and not oblige him to bring an action at law, as well as a bill here.

Id. at 953–54, 2 Atk. at 263.

¹⁰⁹ (1786) 29 Eng. Rep. 1156 (Ch.); 1 Cox 258.

¹¹⁰ *See id.* at 1156, 1 Cox at 258.

¹¹¹ *See id.*

¹¹² *See id.*

¹¹³ *See id.* There were several masters in chancery and the number fluctuated over time.

¹¹⁴ (1806) 33 Eng. Rep. 149 (Ch.); 12 Ves. Jun. 395.

¹¹⁵ *See id.* at 149, 12 Ves. Jun. at 395.

¹¹⁶ *See id.*

¹¹⁷ *See id.*

¹¹⁸ *See id.*

another person, and thus specific performance was impossible.¹¹⁹ The defendant argued that the court had jurisdiction only to dismiss the bill, and the plaintiff could resort to the courts of law for damages.¹²⁰ The plaintiff argued, on the other hand, that *Denton* supported that the court could order damages relief.¹²¹ The Master expressed reservations about the meaning of *Denton* by stating “[t]hat case is so shortly stated in any account of it, that I have seen, that it is impossible to collect distinctly the principle, upon which it was decided.”¹²² Moreover, the Master recited the general rule that courts of law decide damages, and courts of equity order specific performance and injunctions.

The party, injured by the non-performance of a contract, has the choice to resort either to a Court of Law for damages, or to a Court of Equity for a specific performance. If the Court does not think fit to decree a specific performance, or finds, that the contract cannot be specifically performed, either way [the Master] should have thought there was equally an end of its jurisdiction; for in the one case the Court does not see reason to exercise the jurisdiction: in the other the Court finds no room for the exercise of it. It seems, that the consequence ought to be, that the party must seek his remedy at Law.¹²³

The Master emphasized that at minimum *Denton* called this rule into question.¹²⁴ The Master also stated that the facts in *Denton* were similar to those in *Greenaway*,¹²⁵ where specific performance could not occur, because of action taken by the defendant after the contract was signed. Thus, the Master of the Rolls decided to “yield [his] doubts to the authority of Lord Kenyon [in *Denton*]; and . . . follow[ed] the course his Lordship took.”¹²⁶ The Master chose not to send the damages issue to an advisory jury stating

¹¹⁹ See *id.* at 150, 12 Ves. Jun. at 396.

¹²⁰ See *Greenaway*, 33 Eng. Rep. at 151, 12 Ves. Jun. at 399.

¹²¹ See *id.* at 151, 12 Ves. Jun. at 399.

¹²² See *id.* at 151, 12 Ves. Jun. at 401.

¹²³ See *id.* at 151–52, 12 Ves. Jun. at 401.

¹²⁴ See *id.* at 152, 12 Ves. Jun. at 401.

¹²⁵ See *id.* In *Denton*, after the parties contracted, action taken by defendant rendered specific performance impossible. Lord Kenyon [in *Denton*] “thought [that] th[e] Court ought to give damages.” See *id.* at 152, 12 Ves. Jun. at 402.

¹²⁶ See *Greenaway*, 33 Eng. Rep. at 152, 12 Ves. Jun. at 402.

that "I think [I am] just as competent to decide this as a jury. It must consist purely of pecuniary compensation."¹²⁷

In *Gwillim v. Stone*,¹²⁸ a case in the early nineteenth century, the Master, who had previously decided *Greenaway*, distinguished *Denton* and *Greenaway*.¹²⁹ In *Gwillim*, the plaintiff filed a bill that requested compensation from the defendant. The defendant had failed to perform the contract because the defendant did not have title.¹³⁰ Unlike *Denton* and *Greenaway*, where the objects of the bills were specific performance, the object of the bill in *Gwillim* was that the defendant did not have title.¹³¹ The court stated that this was "more proper for an action" at law for damages.¹³²

*Todd v. Gee*¹³³ came after *Gwillim* and similar to *Gwillim*, *Todd* distinguished *Denton*.¹³⁴ Lord Eldon stated that

except in very special cases, it is not the course of proceeding in Equity to file a Bill for specific performance of an agreement; praying in the alternative, if it cannot be performed, an issue, or an inquiry before the Master, with a view to damages. The Plaintiff must take that remedy, if he chooses it, at Law: generally, I do not say universally, he cannot have it in Equity; and this is not a case of exception.¹³⁵

¹²⁷ See *id.* While this language of competence was used, it was not as simple as a question of competence. There is a rich history of damages remedies available in the common law courts before juries, and this history is briefly touched on in this article.

¹²⁸ (1807) 33 Eng. Rep. 469 (Ch.); 14 Ves. Jun. 128.

¹²⁹ See *id.* at 470, 14 Ves. Jun. at 129.

¹³⁰ See *id.* at 469–70, 14 Ves. Jun. at 128–29.

¹³¹ See *id.* at 470, 14 Ves. Jun. at 129.

¹³² See *id.*

¹³³ (1810) 34 Eng. Rep. 106 (Ch.) 107; 17 Ves. Jun. 273, 277–78. Lord Eldon stated "that this Court ought not, except under very particular circumstances, as there may be, upon a Bill for the specific performance of a contract to direct an issue, or a reference to the Master, to ascertain the damages. That is purely at Law." *Id.* at 107, 17 Ves. Jun. at 278.

It has no resemblance to compensation. Where, for instance, an estate is held with an engagement, that a certain number of acres are tithe-free, which is not the case, and the vendee contracts to sell to another person with a similar engagement, this Court would give compensation for so much as was not tithe-free; but would not give compensation for the damage, sustained by not being able to complete the subsequent contract; which might fairly be offered to the consideration of a jury.

See *id.*

¹³⁴ See *id.* at 108, 17 Ves. Jun. at 279.

¹³⁵ *Id.*

He stated that in *Denton*, the defendant initially could have performed the contract of giving possession of the house to the plaintiff but, during the suit, his action of selling the house to another made this impossible.¹³⁶ He concluded that “if [*Denton*] is not to be supported upon that distinction, [it] is not according to the principles of the Court.”¹³⁷

Sainsbury v. Jones,¹³⁸ a case from the mid-nineteenth century, was another case to consider the jurisdiction of the courts of equity to decide damages. While this case is from a period several years beyond the late eighteenth century, the time when the Seventh Amendment was adopted, in principle, the case still speaks to the issue. In *Sainsbury*, the plaintiff contracted with the purported agent of owners of an estate to purchase the estate, and the plaintiff gave the agent a deposit.¹³⁹ However, the agent did not have authority to contract with the plaintiff.¹⁴⁰ The bill named the agent and the owners as defendants.¹⁴¹ The bill requested specific performance and alternatively the deposit, and also the costs incurred in attempting to enforce the contract.¹⁴² At the Rolls, the bill was dismissed against all of the defendants.¹⁴³ On appeal, only the agent was a defendant, and specific performance was not sought.¹⁴⁴ Lord Cottenham said the surrounding facts of the plaintiff’s appeal were equivalent to circumstances in which a plaintiff stated that he could not obtain specific performance but instead requested the deposit and the damages incurred.¹⁴⁵ Lord Cottenham summarized the cases regarding the jurisdiction of the courts of equity to award damages.¹⁴⁶ He stated that the authority for such courts to award damages is based on *Denton* but “at the time, very little weight was attached to it.”¹⁴⁷ Even in *Greenaway*, the Master “threw out strong doubts as to the principle” of *Denton*.¹⁴⁸ This supposed principle from *Denton* “lasted but a short time,” with Lord Eldon expressly overruling *Denton* in *Todd*.¹⁴⁹ Lord Cottenham also stated that like

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ (1839) 41 Eng. Rep. 272 (Ch.); 5 My. & Cr. 1.

¹³⁹ *See id.* at 272, 5 My. & Cr. at 1.

¹⁴⁰ *See id.*

¹⁴¹ *See id.*

¹⁴² *See id.*

¹⁴³ *See id.*

¹⁴⁴ *Sainsbury*, 41 Eng. Rep. at 272–73, 5 My. & Cr. at 2–3.

¹⁴⁵ *See id.*

¹⁴⁶ *See id.* at 273, 5 My. & Cr. at 3–4.

¹⁴⁷ *See id.* at 273, 5 My. & Cr. at 3.

¹⁴⁸ *See id.*

¹⁴⁹ *See id.*

Gwillim, here, the plaintiff did not ask for specific performance, and like *Gwillim*, here, the court should not have jurisdiction to order damages.¹⁵⁰ Indeed, every plaintiff would seek damages in the courts of equity if specific performance by the defendant with whom a plaintiff had contracted was not possible.¹⁵¹ The facts here were even more egregious. The defendant did not have a contract with the plaintiff, and thus the plaintiff could obtain only damages and not specific performance from the defendant. The plaintiff knew that he could not obtain specific performance and sought compensation by a court that did not have jurisdiction to give damages.¹⁵² The fact that the plaintiff could not recover damages in a court of law did not change Judge Cottenham's opinion.¹⁵³

Todd v. Gee was the impetus for Sir Hugh Cairns' Act in 1858,¹⁵⁴ which permitted equity courts to order damages in some circumstances.¹⁵⁵ However, even after the Act was passed, in *Scott v. Rayment*,¹⁵⁶ a court stated that it would not order damages.¹⁵⁷ Under the facts in *Scott*, the defendant had contracted to become the business partner of the plaintiff.¹⁵⁸ The defendant would not perform, and the plaintiff brought a bill for the defendant to specifically perform under the contract or alternatively, for damages.¹⁵⁹ The court stated that in only extraordinary circumstances would a partnership agreement be specifically enforced, and here it would not be.¹⁶⁰

¹⁵⁰ See *Sainsbury*, 41 Eng. Rep. at 272-73, 5 My. & Cr. at 4.

¹⁵¹ See *id.* at 273, 5 My. & Cr. at 2-3.

¹⁵² See *id.* at 273, 5 My. & Cr. at 5.

¹⁵³ See *id.* at 273, 5 My. & Cr. at 2-3.

¹⁵⁴ Chancery Amendment Act, 1858, 21 & 22 Vict. c. 27; cf. Recent Decisions, *Specific Performance—Damages in Lieu of—Inherent Power of Equity to Award Damages in Proper Case*, 31 VA. L. REV. 705, 706 (1945). "The fact is that prior to *Todd v. Gee*, . . . the decisions supported the inherent power of a chancellor to award damages in lieu of specific performance." *Id.* "There is, however, a narrow theory which allows damages only if there are intervening facts, such as a conveyance of the property to a *bona fide* purchaser, its destruction by fire, or the refusal of the vendor's wife, vested with inchoate dower, to join in the conveyance." *Id.*; see also A. Leo Levin, *Equitable Cleanup and the Jury: A Suggested Orientation*, 100 U. PA. L. REV. 320, 333-34 (1951).

¹⁵⁵ Levin, *supra* note 154, at 331-39 (discussing *Denton*, *Greenaway*, *Todd*, and Lord Cairns' Act); see also *infra* text accompanying notes 180-86.

¹⁵⁶ (1868) 7 L.R.Eq. 112 (Ch.).

¹⁵⁷ See *id.* at 115-16.

¹⁵⁸ See *id.* at 112-14.

¹⁵⁹ See *id.* at 114.

¹⁶⁰ See *id.* at 115-16.

The court said that before the Act it would not intervene to order damages,¹⁶¹ and if it would not do so before the Act, then it would not intervene now.¹⁶²

These cases suggest that in the late eighteenth century, the jurisdiction of the courts of equity to decide damages, when a case was otherwise in equity for relief, was not completely clear. While *Denton* suggests that courts of equity could order damages when specific performance or an injunction became impossible during the suit, other cases including *Gwillim*, *Todd*, and *Sainsbury* suggest that *Denton* was not the rule at the time. Most importantly, it is clear that the general jurisdiction of the courts of law was to order damages, and the general jurisdiction of the courts of equity was to order specific performance and injunctions. Moreover, in the rare circumstance when a court of equity ordered damages it occurred only where a court possessed at least purported jurisdiction to order specific performance. It also appeared that the plaintiffs themselves preferred that the courts of equity order damages in these unusual circumstances than for the plaintiffs to be required to file again in a court of law.¹⁶³

3. *Exclusive Jurisdiction of Courts of Equity*

Although courts of equity had limited jurisdiction, a few matters were said to have been for the exclusive jurisdiction of the courts of equity—most notably, trusts. Fonblanque described the exclusive jurisdiction of the courts of equity as “all matters of trust and confidence; and ‘wherever, upon the principles of universal justice, the interference of a court of judicature is necessary to prevent a wrong, and the positive law is silent.’”¹⁶⁴ He added that it was “impossible” to describe fully the jurisdiction of the courts of equity.¹⁶⁵ Blackstone also stated that the form of a trust or second use were matters exclusively for the courts of equity.¹⁶⁶ He stated, however, that some trusts could be heard in law.

¹⁶¹ See *id.*

¹⁶² See 7 L.R.Eq. at 115–16.

¹⁶³ See also Peter M. McDermott, *Jurisdiction of the Court of Chancery to Award Damages*, 109 L. Q. REV. 652, 657–72 (1992) (discussing how courts of equity would usually send issues to be tried by jury in the courts of law but sometimes would send to Master, and discussing cases described above and Lord Cairns’ Act).

¹⁶⁴ 1 BALLOW, *supra* note 78, at 10–11 (in Fonblanque’s additions).

¹⁶⁵ *Id.* at 20.

¹⁶⁶ 3 BLACKSTONE, *supra* note 77, at 439. He also mentioned the true construction of securities for money lent. Blackstone also stated “A technical *trust* indeed, created by the limitation of a second use, was forced into a court of equity, in the manner formerly mentioned [Book II, ch. 20].” *Id.* at 431–32.

[T]here [were] other trusts, which [were] cognizable in a court of law: as deposits, and all manner of bailments; and especially that implied contract, so highly beneficial and useful, of having undertaken to account for money received to another's use, which is the ground of an action on the case almost as universally remedial as a bill in equity.¹⁶⁷

In the early nineteenth century, Thomas Lewin wrote differently that courts of law did not have jurisdiction over trusts in the context of implied contracts. "A common law court could never [have] . . . specifically enforced a trust; but at one time it affected to punish a trustee in damages for breach of the implied contract []; an exercise of authority, however, clearly extra-provincial, and long since abandoned []."¹⁶⁸ Lewin cited *Sturt v. Mellish* in which Lord Hardwicke had explained that no trust existed in that case. Lord Hardwicke stated that "for a trust is where there is such a confidence between the parties, that no action at law will lie, but is merely a case for the consideration of this court (but Lord *Hobart*, it seems, was of opinion, that an action would lie against a trustee at common law. . . . ; and every bailment might as well be said to be a trust as this.)"¹⁶⁹

These references show that trusts were carved out for equity jurisdiction because of the special relationship between the parties. One example would be a trust created for a wife before marriage.¹⁷⁰ Additionally, there was some opinion, though at best mixed, that the courts of law had jurisdiction over some matters of trust.

¹⁶⁷ *Id.* at 432.

¹⁶⁸ THOMAS LEWIN, A PRACTICAL TREATISE ON THE LAW OF TRUSTS AND TRUSTEES 20 (1837) (citations omitted).

¹⁶⁹ *Sturt v. Mellish*, (1743) 26 Eng. Rep. 765 (Ch.) 766; 2 Atk. 610, 612 (internal citations omitted); *cf.* *Jevon v. Bush*, (1685) 23 Eng. Rep. 508 (Ch.) 509; 1 Vern. 342, 344 (citing Lord *Hobart* regarding his opinion but also citing Lord Chief Justice that no action at law for breach of trust); *Allen v. Imlett*, (1817) 171 Eng. Rep. 370 (Assizes) 371; *Holt* 641, 642 (action against trustee is "purely a case for a Court of Equity").

¹⁷⁰ *See, e.g., Allen*, 171 Eng. Rep. at 370, *Holt* at 641.

4. Parliament

In the eighteenth century, Parliament did not act to alter the jurisdiction of the courts of law and equity although it could have done so.

a. Statutes in the Eighteenth Century

In the eighteenth century, pursuant to statutes, including usury statutes,¹⁷¹ labor statutes,¹⁷² bankruptcy statutes,¹⁷³ and intellectual property statutes,¹⁷⁴ Parliament gave plaintiffs rights, for example, against oppressive interest rates, wrongful dismissal, creditors, and infringement. Statutory actions like these were heard in common law courts before juries when the remedy was damages.¹⁷⁵ Plaintiffs could bring bills in the courts of equity to seek relief for statutory rights if they required access to procedural tools of equity, like discovery, or if they sought injunctive relief or specific performance as opposed to damages.¹⁷⁶

¹⁷¹ See JAMES OLDHAM, ENGLISH COMMON LAW IN THE AGE OF MANSFIELD 32–33, 165 (2004).

¹⁷² See *id.* at 346; see also 4 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 379 (1924) (noting that the statutes of labor covered such matters as technical education, supply of laborers, and relations between employers and laborers).

¹⁷³ See OLDHAM, *supra* note 171, at 107 (noting the concurrent jurisdiction between equity and common law courts). Common law courts would assess who could apply for bankruptcy and wrongful acts by debtors constituting acts of bankruptcy, including fleeing, hiding in one's house, and fraudulently conveying property. *Id.* at 113, 116–17; see also 1 JAMES OLDHAM, THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY 409–13 (1992).

¹⁷⁴ See OLDHAM, *supra* note 171, at 190–95, 197–99.

¹⁷⁵ See, e.g., *id.* at 32–33.

¹⁷⁶ In 1732, Parliament gave the Lord Chancellor significant power over bankruptcy jurisdiction. See Joshua Getzler, *Chancery Reform and Law Reform*, 22 LAW & HIST. REV. 601, 605 (2004). There were problems with the bankruptcy commissioners acting to maximize their own wealth in the cases. OLDHAM, *supra* note 171, at 111. Prior to 1732, these cases went to law courts in an ad hoc manner. Getzler, *supra*, at 605. “Bankruptcy gravitated to Chancery partly because of the advantages of its account procedures.” *Id.* at 606. However, both courts of law and equity handled bankruptcy cases in the eighteenth century with fact questions going to juries. OLDHAM, *supra* note 171, at 107.

Late in the eighteenth century, in *Beckford v. Hood*, a case regarding the effect of a statute for the right of publication, the King’s Bench considered the power of Parliament to change the jurisdiction of the courts of law. (1798) 101 Eng. Rep. 1164 (K.B.); 7 T.R. 620. The defendant had argued that because the statute gave a particular remedy “no other [remedy including the common law remedy could] be resorted to.” *Id.* at 1167, 7 T.R. at 627. The court decided if the intention of the legislature was to limit the remedy, this would be enforced even if the statutory remedy was inadequate. *Id.* Here, however,

b. *Statutes in the Nineteenth Century*

In the mid-nineteenth century, Parliament acted to change the jurisdiction of the courts of law. It enacted statutes to permit the courts of law to, among other things, decide cases without juries with the consent of the parties¹⁷⁷ and to grant injunctions and specific performance. The Common Law Procedure Act of 1854,¹⁷⁸ provided in part, for example, that

[t]he Parties to any Cause may, by Consent in Writing, signed by them or their Attorneys, as the Case may be, leave the Decision of any Issue of Fact to the Court, provided that the Court, upon a Rule to Show Cause, or a Judge on Summons, shall, in their or his Discretion, think fit to allow such Trial¹⁷⁹

Parliament also acted to alter the jurisdiction of the courts of equity to permit those courts to order damages. Under the Chancery Amendment Act of 1858 (“Sir Hugh Cairns’ Act”),¹⁸⁰ a court of equity could decide damages when it otherwise had jurisdiction in a case. It has been said that the Act was in response to *Todd v. Gee*, discussed *supra*, which held that in almost all circumstances, Chancery did not have power to order damages.¹⁸¹ The Act provided that

[i]n all Cases in which the Court of Chancery has Jurisdiction to entertain an Application for an Injunction against a Breach of any Covenant,

the court decided this was not the intent of the legislature. *Id.* at 1167–68, 7 T.R. at 627–28. There also appeared to be some opinion that Parliament could change a common law right. *Id.* at 1168, 7 T.R. at 629 (stating House of Lords in *Donaldson v. Beckett* meant that statute could limit the time that the common law right to publication could be exercised); see also *Donaldson v. Beckett*, (1774) 1 Eng. Rep. 837 (H.L.) 839; 2 Brown 129, 130 (six justices decided that statutory period limited right and five justices stated that a common law right existed forever). There were many different types of statutes including ones that regulated the jury. See FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 299 (1772) (statutes regarding juries and number in panel).

¹⁷⁷ Clearly, parties sometimes consented to try their cases without a jury prior to this time.

¹⁷⁸ Common Law Procedure Act (1854) 17 & 18 Vict. c. 125 §§ 1, 68, 79.

¹⁷⁹ *Id.* § 1. The further disappearance of the jury trial occurred without legislation. Frederic N. Smalkin & Frederic N.C. Smalkin, *The Market for Justice, the “Litigation Explosion,” and the “Verdict Bubble”: A Closer Look at Vanishing Trials*, 1 FED. COURTS L. REV. 420, 424–25 (2006), available at <http://ssrn.com/abstract=827145>.

¹⁸⁰ Chancery Amendment Act (1858) 21 & 22 Vict. c. 27.

¹⁸¹ See *supra* text accompanying notes 133–37.

Contract, or Agreement, or against the Commission or Continuance of any wrongful Act, or for the specific Performance of any Covenant, Contract or Agreement, it shall be lawful for the same Court, if it shall think fit, to award Damages to the Party injured, either in addition to or in substitution for such Injunction or specific Performance, and such Damages may be assessed in such Manner as the Court shall direct.¹⁸²

Under the Act, the court could but was not required to order damages.¹⁸³ Additionally, the Act provided that the court could ask a common jury or a special jury to decide the facts or assess the damages,¹⁸⁴ although a court was not required to send a matter to a jury.¹⁸⁵ The Act further provided that the same procedures for obtaining and picking a jury in the common law courts would apply in the equity courts.¹⁸⁶

Rogers v. Challis, also discussed *supra*,¹⁸⁷ informs the discussion of the effect of Sir Hugh Cairns' Act on the jurisdiction of the courts of equity to order damages. The Master first described the jurisdiction of the court before the Act. There, where the defendant had simply contracted with the plaintiff to borrow money, the court could not order specific performance,¹⁸⁸ and the plaintiff would be required to seek damages in a court of law.¹⁸⁹ The court decided that the Act did not change plaintiff's options. After the Act, the court could not order specific performance.¹⁹⁰ Because the court did not properly have jurisdiction to order specific performance, the court could not properly order damages under the Act.¹⁹¹ The court used strong language—"very serious evil"—to describe what would occur if courts of equity would be given power reserved for a jury.

[I]t would be productive of very serious evil, if, in cases which are the proper subjects of an action for damages, or in cases of *assumpsit* upon an

¹⁸² See Chancery Amendment Act, 21 & 22 Vict. c. 27 § II.

¹⁸³ See *id.*

¹⁸⁴ "It shall be lawful for the Court of Chancery, if it shall think fit, to cause the Amount of such Damages in any Case to be assessed or any Question of Fact arising in any Suit or Proceeding to be tried by a Special or Common Jury before the Court itself." See *id.* § III.

¹⁸⁵ See *id.* § V.

¹⁸⁶ Under the Act, the court could also send the matter to the courts of law for a writ of inquiry by a jury, which could be set aside or a new inquiry directed. See *id.* § VI.

¹⁸⁷ See *supra* text accompanying notes 85–95.

¹⁸⁸ *Rogers v. Challis*, (1859) 54 Eng. Rep. 68 (Ch.) 70; 27 Beav. 175, 179–80.

¹⁸⁹ The remedy at law was not "inadequate or defective." *Id.* at 70, 27 Beav. at 179.

¹⁹⁰ See *id.* at 70, 27 Beav. at 180.

¹⁹¹ See *id.*

agreement of some sort, a party could come here for a specific performance of it, or for damages; thus throwing upon a Court of Equity the functions which properly belong to a jury.¹⁹²

The court stated that "I think this is not the meaning of Sir Hugh Cairns' Act, and that it is not desirable to extend it to such cases."¹⁹³ Pursuant to *Rogers*, then, under the Act, if a court of equity otherwise did not have jurisdiction in the case to order specific performance or an injunction, the court could not order damages.

In other cases, the courts would exercise jurisdiction to order damages when the plaintiff had properly brought the case to the courts of equity for a specific performance or an injunction but circumstances prevented this equitable relief. For example, in *Cory v. Thames Ironworks*, the plaintiffs filed a bill after defendants did not deliver a vessel that plaintiffs had contracted to purchase.¹⁹⁴ After the defendants delivered the vessel, the plaintiffs amended the bill to state that they had been entitled to specific performance when the bill was originally filed but now, wanted damages for the delay in performance.¹⁹⁵ The Vice-Chancellor decided that because specific performance was originally properly requested along with damages, the fact that specific performance was not possible did not take jurisdiction away from the court under the Act,¹⁹⁶ and thus the court decided that a jury should decide damages.¹⁹⁷

Eventually, in the late nineteenth century, Parliament merged the courts of law and equity,¹⁹⁸ and also, over time Parliament made more changes to

¹⁹² See *Rogers*, 54 Eng. Rep. at 70, 27 Beav. at 180; J.A. Jolowicz, *Damages in Equity—A Study of Lord Cairns' Act*, 34 CAMBRIDGE L.J. 224, 225 (1975) (citing *Rogers v. Challis* for the proposition that Sir Hugh Cairns' Act did not intend to strip the courts of law of jurisdiction nor give concurrent jurisdiction of all breach of contract and tort cases to courts of equity).

¹⁹³ *Id.* The court concluded that "[t]his is a matter proper for the determination of a Court of law, the questions being, first, whether an action of *assumpsit* will lie upon an agreement to borrow money, and secondly, the amount of the damage which the Plaintiff has sustained." *Id.*

¹⁹⁴ *Cory v. Thames Ironworks and Shipbuilding Co.*, (1863) 8 L.T. 237, 237-38; see also Jolowicz, *supra* note 192, at 226-27. Jolowicz stated that "[w]ittingly or unwittingly, through Lord Cairns' Act, Parliament had conferred upon the Court of Chancery, and thus in course of time upon the Supreme Court of Judicature, a discretionary jurisdiction to award damages which could not have been awarded at common law." *Id.* at 227.

¹⁹⁵ *Cory*, 8 L.T. at 237-38.

¹⁹⁶ See *id.*

¹⁹⁷ See *id.*

¹⁹⁸ Supreme Court of Judicature Act (1873) 36 & 37 Vict., c. 66 § 1 (Eng.).

the jury trial such that it was not available in civil cases unless by court order.¹⁹⁹

In summary, in the eighteenth century, Parliament did not change the jurisdiction of the courts of law and equity and thus the jury. In the nineteenth century, it did so act to change these jurisdictions.

IV. A LIMITATION ON CONGRESS: "IN SUITS AT COMMON LAW"

Accepting the Supreme Court's jurisprudence, as described in Part II, the jury trial right in the Seventh Amendment is governed by the substance of the English common law in 1791, the date when the Seventh Amendment was adopted.²⁰⁰ Using this law, the Court has not interpreted the Seventh Amendment as a significant constraint on Congress similar to its interpretation of other parts of the Constitution like Article I and the First Amendment.²⁰¹ While the Supreme Court has held a jury trial is required in some circumstances where Congress created a cause of action without a jury trial right, in other circumstances, the Court has decided an administrative scheme or court of equity created by Congress is incompatible with a jury trial.²⁰² The assessment of when a jury trial right exists has been based on whether an analogous cause of action existed at common law and whether the type of relief sought by the plaintiff was available in the law courts, in conjunction with the compatibility of the matter with a jury trial.²⁰³

As described in Part III, however, in the late eighteenth century in England, the general distinction upon which a jury trial existed was whether the plaintiff sought damages. Courts of law with juries heard claims with damages, and courts of equity decided claims seeking specific performance and injunctions. In rare cases, when a court of equity otherwise had jurisdiction, a court of equity might order damages, but this exercise of jurisdiction to order damages was quite controversial.²⁰⁴ Also, only in cases

¹⁹⁹ Joshua Getzler, *The Fate of the Civil Jury in Late Victorian England*, in "THE DEAREST BIRTH RIGHT OF THE PEOPLE OF ENGLAND": THE JURY IN THE HISTORY OF THE COMMON LAW 221 (John W. Cairns & Grant McLeod eds., 2002); Michael Lobban, *The Strange Life of the English Civil Jury, 1837–1914*, in "THE DEAREST BIRTH RIGHT OF THE PEOPLE OF ENGLAND": THE JURY IN THE HISTORY OF THE COMMON LAW 173–209 (John W. Cairns & Grant McLeod eds., 2002).

²⁰⁰ See *supra* notes 15–25 and accompanying text.

²⁰¹ See *supra* note 5 and accompanying text (citing Redish and La Fave article).

²⁰² See *supra* text accompanying notes 15–70.

²⁰³ See *id.*

²⁰⁴ See *supra* Part II; see also OLDHAM, *supra* note 66, at 21 ("No case in late-eighteenth century England is known where the plaintiff sued at common law for damages, as in *Markman*, yet the common-law court decided the factual issues were

of trusts and then, only for certain of those cases, did courts of equity have exclusive jurisdiction.²⁰⁵ Thus, the substance of the difference between the courts of law and equity in England was the remedy not the right, and in the late eighteenth century, Parliament did not act contrary to these divisions between the courts of law and equity.

In the mid-nineteenth century, however, Parliament acted to change the jurisdiction of the courts. Parliament permitted equity courts to order damages without a jury trial when it otherwise properly had the case and also permitted the parties to agree to try a case in a court of law by a judge without a jury.²⁰⁶ The jurisdiction of the jury continued to decrease over time in England through statutory and other developments.²⁰⁷ Thus, while juries in courts of law had the almost exclusive jurisdiction to determine claims with damages in the late eighteenth century, Parliament later exercised power to change this jurisdiction of the courts, including the jurisdiction of the jury, as evidenced by jurisdiction changing statutes in the nineteenth century.

Because Parliament exercised power to alter the jurisdiction of the jury in the nineteenth century, it appears that Parliament could have exercised such power in the late eighteenth century. Because Parliament could exercise this power in England in the late eighteenth century when the Seventh Amendment was adopted, assuming the historical test includes the unexercised power of Parliament, it could be argued that if Congress chose to give certain matters with damages to non-jury adjudicatory bodies, this power would be constitutional under the Seventh Amendment.

The English Constitution was different, however, than the United States' Constitution.²⁰⁸ Despite *Bonham's Case*,²⁰⁹ there was the general belief that

beyond the jury's capacity, causing the court to send the case to Chancery."); Morris S. Arnold, *A Modest Replication to a Lengthy Discourse*, 128 U. PA. L. REV. 986, 988 (1980) ("[T]he plaintiff is the master of his cause of action; once it is characterized as legal by him, the ordinary attributes of a trial at law, including the availability of a jury, necessarily follow.").

²⁰⁵ See *supra* text accompanying notes 164–70.

²⁰⁶ See *supra* text accompanying notes 177–99.

²⁰⁷ See *supra* text accompanying notes 177–99.

²⁰⁸ See also Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process and The Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 VA. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1581440> (discussing habeas corpus in England pursuant to English Parliamentary supremacy); Sward, *supra* note 6, at 1098–1105 (discussing differences between Constitutions).

²⁰⁹ In *Bonham's Case*, in the early seventeenth century, Sir Edward Coke indicated if an act was against the common law or natural equity or reason then a court can find the act void. See Dr. Bonham's Case, (1610) 77 Eng. Rep. 646 (K.B.); 8 Co. Rep. 113b. It is unclear the extent to which this was really the law. Coke was even called up to justify his

Parliament could take any actions, including the alteration of the common law.²¹⁰ Blackstone stated that Parliament was “always of absolute authority.”²¹¹ Moreover, statutes could be “declaratory” or “remedial” of the common law, and it was stated that “the common law gives place to the statute.”²¹² Despite the hesitation of the court in *Rogers v. Challis* regarding the jurisdiction of the courts of equity to order damages following Sir Hugh Cairns’ Act, described *supra*,²¹³ undoubtedly the Common Law Procedure Act, Sir Hugh Cairns’ Act and subsequent acts assumed the power of Parliament to alter the jurisdiction of the courts, including the jurisdiction of the jury.

Different from this constitutional structure, the United States’ Constitution grants Congress certain specified authority in Article I, which does not give Congress any authority over the jury. Further, the Seventh Amendment itself grants only the judiciary power over the jury to “re-examine[] [facts tried by a jury] . . . according to the rules of the common

points to the King. He replied he meant nothing more than what was expressed in the precedent he cited. Plucknett is critical of much of the precedent cited by Coke in *Bonham* for the proposition that a court can void an act of Parliament. See PLUCKNETT, *supra* note 96, at 51, 336–37. In any event, Plucknett says that the Glorious Revolution in 1688 and Bill of Rights makes *Bonham’s Case* irrelevant to England. See *id.* Much of common law was expressly displaced by the Bill of Rights. See *id.* The Magna Carta has even been amended and repealed. *Id.* Parliament is sovereign or in other words Supreme. See *id.* Still, though, some referenced that a court can void an act if the act is impossible. See *id.*

²¹⁰ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 90–91 (The Univ. of Chi. Press 1979) (1765); 1 BALLOW, *supra* note 78, at 17–18 (“But if the law has determined a matter with all its circumstances, equity cannot intermeddle . . . and for the Chancery to relieve against the express provision of an act of Parliament, would be the same as to repeal it. . . . Equity, therefore, will not interpose in such cases, notwithstanding accident and unavoidable necessity.”); PLUCKNETT, *supra* note 96, at 337 (“Parliament could do anything but make a man a woman.”).

Blackstone also stated that acts contrary to reason would not be enforced, 1 BLACKSTONE, *supra*, at 90–91, but Fonblanque says his statements of parliamentary supremacy are contradictory to this, see 1 BALLOW, *supra* note 78, at 23 (in Fonblanque’s additions).

²¹¹ 1 BLACKSTONE, *supra* note 210, at 90, 143 (“the supreme and absolute authority of the state”); A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 37–176 (8th ed. 1915) (parliamentary sovereignty).

²¹² 1 BLACKSTONE, *supra* note 210, at 86–87, 89. In *Beckford*, the court acknowledged that it would follow the intention of Parliament even if the remedy that Parliament provided was inadequate, and in *Donaldson*, the House of Lords arguably implied that Parliament may act contrary to the common law. See *supra* note 176.

²¹³ See *supra* text accompanying notes 187–93.

law.”²¹⁴ Moreover, the separation of powers recognized between the judiciary and the legislature in the Constitution would suggest that Congress should not be able to exercise additional authority over the jury right.²¹⁵ One could argue that the general Seventh Amendment language that “preserved” the jury trial also supports that Congress does not have special authority,²¹⁶ because the constitutional grant of power to Congress to eliminate the jury would make this “preserved” language meaningless. Finally, in the late eighteenth century in England, there was no experience with a legislature-dictated jury trial right despite the power of Parliament to alter it.²¹⁷ The experience in the late eighteenth century was that juries heard claims with damages in the law courts, and Parliament did not interfere.²¹⁸ Thus, if it had been the intention to give Congress power contrary to this, Congress’s power would have been explicit. Absent this provision in the Constitution, because juries heard claims with damages in the common law courts in the late eighteenth century in England, and Congress has no special authority to change this division, claims with damages should be heard by juries.²¹⁹

In *The English Constitution*, Walter Bagehot stated that the English Constitution should not be described as setting forth a division of authority into legislative, executive and judicial powers, which were separate and equally balanced.²²⁰ He stated that instead “[t]he efficient secret of the English Constitution may be described as the close union, the nearly complete fusion of the executive and legislative powers.”²²¹ In Bagehot’s

²¹⁴ U.S. CONST. amend. VII.

²¹⁵ Cf. Sward, *supra* note 6, at 1049–52 (discussing Article III and separation of powers in the context of constitutional illegitimacy of legislative courts).

²¹⁶ U.S. CONST. amend. VII.

²¹⁷ See *supra* text accompanying notes 171–76.

²¹⁸ See *supra* text accompanying notes 171–76.

²¹⁹ As a corollary, even the text of the Amendment that references “exceed twenty dollars” suggests a jury trial right in any case where there are claims with damages exceeding twenty dollars. Note, *The Twenty Dollars Clause*, 118 HARV. L. REV. 1665 (2005). Moreover, the somewhat inflexible nature of the Amendment with the \$20 clause that must be changed by Amendment suggests the overall inflexible nature of the Seventh Amendment. *Id.* at 1672. As other examples, no other provision of the Constitution refers to common law or rules. U.S. CONST. Also, this specific change to the English common law suggests that the only change to the common law right was a requirement of twenty dollars. Also, the Seventh Amendment was not necessary if Congress could decide the jurisdiction of the jury because Congress had already acted to establish a jury trial in civil cases in 1789 prior to the constitutional amendment.

²²⁰ WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 2 (1872).

²²¹ *Id.* at 10. The cabinet, part of the legislature selected to be the executive, was “the connecting link.” *Id.* at 11.

view, the United States' Constitution was based on a misimpression that the English system was a checks and balances system.

The Americans of 1787 thought they were copying the English Constitution, but they were contriving a contrast to it. Just as the American is the type of composite governments, in which the supreme power is divided between many bodies and functionaries, so the English is the type of simple constitutions, in which the ultimate power upon all questions is in the hands of the same persons. The ultimate authority in the English Constitution is a newly-elected House of Commons.²²²

Plucknett also contrasted the English system of parliamentary supremacy and the American system of judicial review.²²³ Consistent with the views of Bagehot and Plucknett on differences between the American and English systems, another commentator concluded that the results of Lord Cairns' Act to give equity courts jurisdiction to decide damages could not be achieved without constitutional amendment in the United States.

American judges and legislators are limited throughout this matter by constitutional requirements of jury trials in all cases except those where equity had power to assess damages at the time the constitutions were adopted. Since equity at such times had only a parasitic jurisdiction to award damages for the sake of completeness where some injunctive relief was given, these jury requirements bar any jurisdiction in equity to give damages in entire substitution for equitable relief unless the defendant waives his jury claim. Until constitutional amendments alter this situation, the results of Lord Cairns' Act probably cannot be attained in this country.²²⁴

In his dissent in *Parsons*, Justice McLean posed the possibility that Congress could eliminate the lower courts and thus the jury.²²⁵ As a result, he argued that Congress should be able to act as it wanted with respect to the jury trial right.²²⁶ While it is true that Congress may be able to eliminate the lower courts, it has not done so. Thus, the courts must assure that

²²² *Id.* at 227; see also CHARLES DE SECONDAT MONTESQUIEU, *THE SPIRIT OF LAWS*, Book 11, ch. 6 (Thomas Nugent trans., 1900) (separation of powers between monarch, parliament and judiciary under English Constitution); cf. PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008) (Parliament as court not legislature).

²²³ PLUCKNETT, *supra* note 96, at 337 (Coke influenced judicial review in America).

²²⁴ Note, *Lord Cairns' Act: Statutory Jurisdiction of Modern Equity Courts to Award Prospective Damages*, 38 HARV. L. REV. 667, 671-72 (1925).

²²⁵ *Parsons v. Bedford*, 28 U.S. 433, 456 (1830) (McLean, J., dissenting).

²²⁶ See *supra* text accompanying notes 31-33.

congressional acts comply with the Seventh Amendment. Additionally, even if Congress were to eliminate the lower courts, the Seventh Amendment would continue to apply to the Supreme Court.

The constitutional text and English history thus support that Congress has no special authority with respect to the constitutional jury trial right.²²⁷ Accordingly, if Congress creates a statutory scheme that grants damages, those claims should be determined by a jury as they were in England in the late eighteenth century. Indeed, the Court never gave support from English history when it decided Congress can give certain matters with damages to non-Article III courts. Also, there was no support from English history for cases to be taken from juries because of incompatibility or functional justifications.²²⁸

²²⁷ Additionally, there is evidence in the documents at the time of the framing of the Constitution and the adoption of the Amendment that shows that it was argued by the Federalists in the Constitutional Convention and in the ratification debates that no jury trial right was needed because Congress would protect the jury trial right. On the other hand, the Anti-federalists argued that the right to a jury trial was partly needed to protect against congressional overreaching, including significant power under the necessary and proper clause. The Anti-federalists achieved their goal of the adoption of a jury trial right so it seems unlikely that this right would be controlled by what Congress wanted. See Wolfram, *supra* note 12, at 664–65; see also Redish & La Fave, *supra* note 5, at 430–50 (no historical justification for the public/private distinction for when a jury trial right exists); Sward, *supra* note 6 (arguing administrative agencies, adjuncts (including bankruptcy and magistrate judges), tax courts, and territorial courts are constitutionally problematic under the Seventh Amendment).

Harold Chesnin and Professor Hazard argue that “[t]he English precedents indicate that in 1791 the Court of Chancery did not usually exercise authority to resolve contested issues of fact and seemingly did not regard itself as competent to do so.” Harold Chesnin & Geoffrey C. Hazard, Jr., *Chancery Procedure and the Seventh Amendment: Jury Trial of Issues in Equity Cases Before 1791*, 83 YALE L.J. 999, 1000 (1974). Chesnin and Hazard conclude, however, that “it is legitimate for Congress to prescribe the mode of trial in actions other than ‘suits at common law’ in the narrowest sense, that is, suits to enforce rights created by Congress that are something more than simple analogues of rights of action available at common law.” *Id.* at 1020–21. Professor Langbein disagreed that courts of equity could not decide disputed issues of fact. Courts of equity sometimes referred these matters to courts of law because of the burden on equity. John H. Langbein, *Fact Finding in the English Court of Chancery: A Rebuttal*, 83 YALE L.J. 1620, 1630 (1974). Langbein argues that this shift to the less burdened would now shift cases to judges. *Id.*

²²⁸ See Redish, *supra* note 7, at 518–26 (discussing *Jones*, *Katchen*, *Curtis*, *Beacon Theatres*, *Dairy Queen*, and *Ross* and stating that the Court has created “irrational distinctions”). Professor Oldham has stated that “[t]he Seventh Amendment historical test has become an American legal fiction in application, since many more things were lodged in juries in England than modern American courts, including the Supreme Court, are prepared to acknowledge.” OLDHAM, *supra* note 66, at 15, 5–16 (discussing the

In *Parsons*, Justice Story had the view that claims with damages were heard by juries in England and should be heard by juries in America.²²⁹ His view is the most appropriate one accepting the English common law as the governing law and recognizing the differences between the English and American Constitutions. Indeed, following the merger of law and equity in the 1930s in the federal rules, the appropriate role of the jury became even more apparent. Because a jury was readily available in all cases after the merger, a jury could decide claims with damages as juries heard them in the common law courts.

The Court itself has recognized that the second inquiry of the relief is the most important to whether a jury trial right exists,²³⁰ and the English case law demonstrates that the Court was correct about the importance of this inquiry. Indeed the English case law shows this should be the only inquiry. Once Congress creates a cause of action, where there are damages, including ones currently before administrative agencies and bankruptcy courts, juries should decide those cases because under the substance of the common law, juries decided claims with damages.²³¹

improper historical analysis in *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), where the Court had stated juries did not interpret claims or terms of art). Professor Oldham has also written about a possible complexity exception. See OLDHAM, *supra* note 66, at 17–24.

²²⁹ 28 U.S. 443 (1830).

²³⁰ See *supra* text accompanying note 53.

²³¹ Indeed, in bankruptcy the Supreme Court has ruled that, unless defendant filed a claim in the bankruptcy, defendant has a jury trial right in preference and fraudulent transfer actions to recover funds transferred prepetition to defendant. See *Langenkamp v. Culp*, 498 U.S. 42 (1990); *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989); *Katchen v. Landy*, 382 U.S. 323 (1966). More controversially, a jury trial right could even exist in preference and fraudulent transfer actions where defendant has filed a claim in the bankruptcy and in some circumstances where a debtor has disputed a creditor's claim against the bankruptcy estate. These arguments could include that the nature of bankruptcy jurisdiction limits the jury trial right as well as that a jury trial is waived by the filing of claims. For significant discussions of bankruptcy and the Seventh Amendment jury trial right, see, e.g., Douglas G. Baird, *The Seventh Amendment and Jury Trials in Bankruptcy*, 1989 SUP. CT. REV. 261 [hereinafter Baird, *Seventh Amendment*]; Douglas G. Baird, *Jury Trials After Granfinanciera*, 65 AM. BANKR. L.J. 1 (1991); Stephen J. Ware, *Bankruptcy Law's Treatment of Creditors' Jury-Trial and Arbitration Rights*, 17 AM. BANKR. INST. L. REV. 479 (2009). For an interesting discussion regarding "bankruptcy exceptionalism in constitutional matters," see Jonathon C. Lipson, *Debt and Democracy: Towards A Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605 (2008).

Congress passed the first bankruptcy statute in 1800. See Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743 (2000). Under that statute, only creditors could

V. CONCLUSION

Although not typically viewed in this manner, the Seventh Amendment limits Congress, similar to the limitation that Articles I, II, and III and the First Amendment place on Congress. When Congress has created a cause of action with damages, Congress cannot determine whether the claim is heard by a jury. Under the governing English common law, a jury trial right exists for congressionally-created claims with damages, as claims with damages were, almost without exception, heard by juries in England in 1791, and Congress does not possess any special power under the Constitution to change this jurisdiction, including to require damages to be determined by administrative agencies and bankruptcy courts.

bring a petition in bankruptcy court, and it could be brought only against trader debtors. *See id.* at 758 & nn.40–41. Moreover, there was provision for a jury trial. *See id.*; Baird, *Seventh Amendment*, *supra*, at 263 (jury trial right under 1800 and 1841 Bankruptcy Acts). For example, Congress provided that a creditor could object to the determination of a claim by a commissioner, and the matter would be referred for a jury trial in the circuit courts. *See Brubaker, supra*, at 758 & nn.40 & 41. For a brief discussion of the jury trial in bankruptcy matters in England, see *supra* notes 173 & 176.